

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSHUA JAMES KINDER and
SHANE MICHAEL GOGEL,

Plaintiffs,

v.

DECISION AND ORDER
10-CV-248

CITY OF SALAMANCA,
SALAMANCA POLICE DEPARTMENT, and
SGT. RHONDA STANTON

Defendants.

The instant case involving causes of action for malicious prosecution and false imprisonment under state and federal law, violations of Plaintiff's rights under the Fourteenth Amendment, negligent supervision, gross negligence, and negligent infliction of emotional distress was referred to Magistrate Judge Jeremiah J. McCarthy pursuant to 28 U.S.C. §636(b)(1). On June 30, 2011, Defendants filed a motion for summary judgment dismissing Plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 56. (Dkt. No. 16) On August 2, 2011, Plaintiffs filed a cross motion for leave to amend their complaint. (Dkt. No. 26)

On March 30, 2012, Magistrate Judge McCarthy issued a Report, Recommendation and Order ordering that Plaintiffs' motion for leave to amend the complaint to assert two additional claims pursuant to 42 U.S.C. §1983

("Section 1983") be granted. (Dkt. No. 31) Further, Magistrate Judge McCarthy recommended that Defendants' motion for summary judgment be granted to the extent of dismissing all claims against the Salamanca Police Department as well as the Section 1983 and punitive damages claims against the City of Salamanca, but otherwise denied. *Id.*

Specifically, Magistrate Judge McCarthy recommended the following: (1) that this Court dismiss Plaintiffs' claims against the Salamanca Police Department because it is not a separate entity subject to suit; (2) that this Court dismiss Plaintiffs' request for punitive damages because they are not recoverable against municipal defendants; (3) that this Court deny summary judgment as to the claims arising from Sargent Stanton's grand jury testimony since Sargent Stanton is not entitled to absolute immunity for her grand jury testimony; (4) that this Court deny summary judgment as to Plaintiffs' claims for false arrest, malicious prosecution, and malice because there exist triable issues of fact and Sargent Stanton is not entitled to qualified immunity as a matter of law; (5) that this Court grant summary judgment with respect to Plaintiffs' Section 1983 claims against the municipal defendants; and (6) that this Court deny summary judgment as to Plaintiffs' state law claims arising from *respondeat superior* liability, negligent supervision, gross negligence and negligent infliction of emotional distress since Defendants failed to argue a basis for their dismissal. *Id.*

Three days after the Report, Recommendation and Order was filed, the

United States Supreme Court issued a decision addressing a split in the circuit courts over whether a witness is entitled to absolute immunity with respect to their testimony before a grand jury. See *Rehberg v. Paulk*, 132 S.Ct. 1497 (2012). On April 2, 2012, Magistrate Judge McCarthy issued a text order staying the deadline for objections to his Report, Recommendation and Order and inviting the parties to submit briefs as to whether the Supreme Court's decision in *Rehberg* required reconsideration of his Report, Recommendation and Order. (Dkt. No. 32) Both Plaintiffs and Defendants submitted briefs in response to Magistrate Judge McCarthy's April 2, 2012 text order. (Dkt. Nos. 33 and 34)

On May 10, 2012, Magistrate Judge McCarthy issued an Amended Report and Recommendation wherein he recommended that, in light of *Rehberg* and the parties' additional submissions, "[P]laintiff's claims against Sgt. Stanton under 42 U.S.C. §1983 be dismissed to the extent that they are based upon her grand jury or preliminary hearing testimony." (Dkt. No. 35) Magistrate Judge McCarthy stated that, in all other respects, his Report, Recommendation and Order remained unchanged. *Id.*

On May 25, 2012, Defendants filed objections to specific findings in Magistrate Judge McCarthy's Report and Recommendation. (Dkt. No. 36) Plaintiffs filed a response to Defendants' objections on June 19, 2012. (Dkt. No. 38) Defendants filed a reply on June 28, 2012 (Dkt. No. 39), and the Court deemed the matter submitted.

Pursuant to 28 U.S.C. §636(b)(1), this Court must make a *de novo* determination of those portions of the Report and Recommendation to which objections have been made. Upon a *de novo* review, and after reviewing the submissions from the parties, the Court hereby adopts Magistrate Judge McCarthy's recommendation granting in part and denying in part Defendants' motion for summary judgment.

Accordingly, for the reasons set forth in Magistrate Judge McCarthy's Report, Recommendation and Order dated March 30, 2012 (Dkt. No. 31) and the Amended Report and Recommendation dated May 5, 2012 (Dkt. No. 35), Defendants' motion for summary judgment is granted to the extent of dismissing all claims against the Salamanca Police Department, the Section 1983 and punitive damages claims against the City of Salamanca and the Section 1983 claims against Sargent Stanton only to the extent that they are based upon her grand jury or preliminary hearing testimony. Defendants' motion for summary judgment is denied in all other respect.

The case is referred back to Magistrate Judge McCarthy for further proceedings.

SO ORDERED.

s/ Richard J. Arcara

HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

DATED: March 25, 2013

